BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: March 17, 1998

CASE NO: 97-INA-00097
In the Matter of:

STANLEY & HERMINE ROSIN
Employer,

On Behalf of:

FELICITAS T. KALAW
Alien

Appearance: Jack Golan, Esq.
Los Angeles, California
for the Employer and the Alien

Before: Holmes, Jarvis and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Felicitas T. Kalaw ("Alien") filed by Employer Stanley and Hermine Rosin ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On November 20, 1995, the Employer filed an application for labor certification to enable the Alien, a Philippines national, to fill the position of Cook -Domestic in her home in Palm Springs, California.

The duties of the job offered were described as follows:

> "Prepare, cook and serve meals in private home, prepare menus based on tastes on dietary needs, including low cholesterol diet, of family, prepare and cook various American dishes according to recipes for vegetables, soups, sauces, meat, roasts, chicken, fish and all ingredients for appetizers and other special dishes for use at social and business entertainment functions, maintain food and supply inventory, order supplies and foodstuffs when necessary."

No education and two years experience in the job were required. Special requirement was "require verifiable references". Wages were $11.57 per hour. (AF-33-52)

On March 1, 1996, the (Acting) CO issued a NOF denying certification, finding that the job offer did not establish full time employment. Compliance by Employer would require documentation of(summarized): number and length of meals prepared daily and weekly; if need includes entertainment, prior and current schedule of same for the prior year; any duties other than cooking; a doctor's order if there are special dietary needs. The CO stated that the alien's last employment as a cook was in 1984; documentation of current work history must be submitted. (AF-29-31)

On April 2,1996, Employer through counsel forwarded an extensive rebuttal outlining the duties required, the allegation that Employers entertained extensively, and that Mrs. Rosin did the cooking with the assistance of the houseman as well as

catering service prior to hiring of alien part time in August, 1995. Employer noted that alien had additionally worked as a cook at the Crown Hotel in the Philippines from March, 1984 until November, 1989. Employer noted that their ages were 85 and 79, both had bi-pass heart surgeries, Mrs. Rosin had had a foot amputated, while Mr. Rosin was legally blind. Daily household chores were performed by the Houseman, gardening service is used. "In conclusion, based upon the extensive daily food preparation, cooking and menu planning duties, along with our frequent entertaining commitments that are the sole responsibility of the cook, the position clearly constitutes full time employment." (AF-15-28)

On July 23, 1996, the CO issued its Final Determination denying certification based on a failure by Employer to demonstrate through documentation that the job offer was full-time. The CO stated: "The employer's rebuttal states that there will be 8-10 daily meals, 50 meals per week and 60-120 minutes preparation time during the alien's work week; no specific work days were indicated. While it may appear that there is a need for some meal preparation, the job duties to be performed by the cook do not appear to constitute full-time employment. In fact, the employer has hired the alien on a part-time basis since August 1995. It appears that this arrangement between the alien and the employer has worked with no apparent problems. And that reasonable alternatives such as catering services have been utilized in the past." (AF-13,14)

On August 15, 1996, Employer requested review of the Final Determination by this Board. (AF-1-12).

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. Gerata Systems America, Inc., 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. Collectors International, Ltd. 89-INA-133 (Dec. 14, 1989) Further,

the burden of proof rests with the Employer to demonstrate by substantial evidence that the position is full time. Dr. Vladimar Levit, M.D.,95-INA-00540(July 15, 1997)

The sole issue raised by the CO in her Final Determination, on the other hand, comes down to a dispute that preparation of a particular meal or combination of meals takes a certain amount of time, while the CO disagrees and says that it will take less time, or that other alternative methods (of preparing food) are available. In the absence of supporting evidence the CO's conclusion that the duties described would not constitute forty hours of work is speculative at best. Where such disputes have arisen in many recent cases, we have concluded that the evidence of record supports the finding that the Employer offered full time employment. Vivian Shulman, 96-INA-00239 (Oct. 28, 1997) Anita Catalano, 95-INA-641 (Sept. 30, 1997); Meta Hill, 95-INA-673 (Sept. 30, 1997); James Hanna, 96-INA-00028 (Sept. 30, 1997) Alice Rog, 95-INA-679 (Sept. 30, 1997); Roberta Clapper, 95-INA-153 (Sept. 11, 1997); Martin Rosenberg, 95-INA-675 (Sept. 5, 1997). (Many of the above cases were remanded on other bases not here present). We believe the facts in this case are generally in conformance with these cases. Summarized, the Employer has well documented that because of advanced age, infirmaries and entertainment requirements, the need for a full-time cook/domestic is warranted as a business necessity. Since the CO did not challenge the alien's qualifications or the rejection of U.S. applicants in her Final Determination, there is no basis for affirmance of denial or for remand. Barbara Harris, 88-INA-32 (April 5, 1989); DEP Corporation, 95-INA-171(Mar. 13, 1997).

ORDER

The Certifying Officer's Denial of Certification is Vacated and the matter Remanded to grant Certification.

For the Panel

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JOHN C. HOLMES
Administrative Law Judge

Judge Jarvis concurs in the result based upon the facts of this case, but does not agree with some of the authorities cited in the decision.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.